



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Amkus, Inc.
File: B-228048
Date: December 2, 1987

DIGEST

1. General Accounting Office finds no merit to protester's contention that submission and evaluation of bid sample from small business bidder was mandatory when clear language of the certification waiver provision in solicitation provides only that agency may require submission and evaluation of bid samples.
2. As the objective of the General Accounting Office's (GAO's) bid protest function is to ensure full and open competition for government contracts, GAO will not consider allegation that more restrictive specifications are needed to serve the government's needs.
3. General Accounting Office will not consider question of a bidder's responsibility in absence of a showing of possible fraud in affirmative determination of responsibility or that the solicitation contains definitive responsibility criteria that have been misapplied.

DECISION

Amkus, Inc. protests the award of a contract to Sweed Machinery, Inc., under invitation for bids (IFB) No. DAAK01-86-B-C411, issued by the Department of the Army as a total small business set-aside. Amkus alleges that the agency improperly waived the IFB's certification-of-commercial-item requirement for Sweed, a small business, without requiring and evaluating a bid sample prior to award. We find that the protester has erroneously interpreted the certification provision, and deny the protest in part and dismiss it in part.

The IFB contemplated a 1-year requirements contract for an estimated quantity of 160 forced entry and rescue tools (for use in firefighting) in accordance with a commercial item description (A-A-50221). After receiving an affirmative preaward survey for Sweed, the low bidder, the agency issued the firm a delivery order for an initial quantity of 59

040735

units. Amkus protested the award to our Office after its initial protest to the agency was denied.

The IFB's commercial item certification provision generally required bidders to certify that the product offered was the manufacturer's current product and had been in the commercial marketplace for at least 1 year preceding the solicitation. However, the provision provided a waiver of the certification requirement for small businesses as follows:

"A small business that cannot meet the certification-of-commercial-item requirement, may make an offer under this solicitation; and, if such small business is the apparent successful offeror, the government may require the small business to submit a sample forced entry and rescue tool. Any such tool may be evaluated for this solicitation if time to contract award permits It should be noted that bid samples are not required unless specifically requested by the contracting officer. Note. The Government may elect not to evaluate a bid sample from an apparent low bidder for award for this solicitation if a determination of urgency is made by the contracting officer. The bid sample would then be evaluated prior to future solicitation for comparable items."1/

The protester interprets this provision to require the submission and evaluation of a bid sample as a prerequisite for award to a small business bidder. Under the protester's interpretation, if the agency decided not to require a bid sample, the small business bidder would be eliminated from consideration for this award, and award would be made to the next bidder in line with a certified product. The protester concludes that since the Army did not require a bid sample from Sweed, the award to Sweed was improper.

We find that Amkus has erroneously interpreted the plain language of the certification-of-commercial item waiver for

1/ The provision for waiver of the certification-of-commercial item requirement for small businesses derived from Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement, 48 C.F.R. § 211.005 (1986), which provides that solicitations shall not require small business bidders to demonstrate that their products are accepted in the commercial market in order to be eligible to submit a bid or offer.

small business bidders. The language used in the waiver concerning submission and evaluation of bid samples is the permissive may, i.e., "the government may require . . . a sample" and "[the] tool may be evaluated," and the provision specifically states that bid samples are not required unless requested by the contracting officer. Based on this plain language, we think that the Army did not intend to require the submission and evaluation of a bid sample from a small business as a prerequisite to award; rather, imposition of the requirement was to be a matter within the Army's discretion. The record indicates that the Army determined urgent circumstances existed and elected to evaluate a preproduction sample rather than require and evaluate a bid sample from Sweed. Since this action was permissible under the clear language of the certification provision, there is no basis for questioning the agency's action.

Contrary to the protester's further position that the solicitation was required by regulation to provide for mandatory evaluation of bid samples, the FAR does not generally require bid samples. See FAR, 48 C.F.R. § 14.201-6(o)(1). Further, to the extent the protester is arguing that a more restrictive bid sample provision, or a more restrictive interpretation of the existing provision, is necessary to serve the government's interests, we will not consider such an allegation. As the objective of our bid protest function is to ensure full and open competition for government contracts, a protester's presumable interest as the beneficiary of a more restrictive specification is not protectable under our bid protest function. Ingersoll-Rand Co., B-224706 et al., Dec. 22, 1986, 86-2 CPD ¶ 701.

Amkus argues at some length--indeed, this seems to be the crux of its protest--that Sweed is not qualified to produce an acceptable product because the firm has not previously manufactured rescue tools. The question of whether Sweed has the capacity and will actually perform by furnishing items built in accordance with the commercial item description, however, is a question of the firm's responsibility. Prior to award, an agency is required to make an affirmative determination of the prospective awardee's responsibility, which we will not question absent a showing of possible fraud or that the solicitation contains definitive responsibility criteria that have been misapplied. Le Don Computer Services, Inc., B-225451, Jan. 9, 1987, 87-1 CPD ¶ 46; FAR, 48 C.F.R. § 9.103(b). Neither allegation was made here. Further, once the contract is awarded, an allegation that an awardee may provide nonconforming products is a matter of contract administration, which is the responsibility of the contracting agency, not our Office. 4 C.F.R. § 21.3(f)(1) (1987).

Finally, in its comments on the agency report, Amkus argues for the first time that the awardee did not acknowledge the first three of the five amendments to the solicitation. This allegation is untimely since it was not raised within 10 working days after bid opening, the point at which Amkus should have been aware of any alleged deficiency in Sweed's bid. 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.

for Seymour E. Hinchman
James F. Hinchman
General Counsel